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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 79

HARRY C. MOORE, AS TREASURER OF GRANT COUNTY, INDIANA, PETITIONER,

vs.

SIDNEY Z. MITCHELL AND NIEL A. WEATHERS (SUED AS NEIL A. WEATHERS), AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF RICHARD EDWARDS BREED, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 4, 1929

CERTIORARI GRANTED JUNE 3, 1929

(34,188)

(34,188)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 9, 1929

[fols. a & 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

HARRY C. MOORE, as Treasurer of Grant County, Indiana, Plaintiff,

against

SIDNEY Z. MITCHELL and NIEL A. WEATHERS (Sued as Neil A. Weathers), as Executors of the Last Will and Testament of Richard Edwards Breed, Deceased, Defendants

NOTICE OF MOTION FOR ORDER DISMISSING COMPLAINT

SIR: Please take notice that on the summons, complaint and the stipulation extending the time of the defendants to answer or move with respect to the complaint to and including May 4, 1928, the undersigned will move this Court at a stated term thereof for the hearing of motions to be held at the Court House in the old Post Office Building in the Borough of Manhattan, City, County and State of New York on the 4th day of May, 1928, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order and judgment dismissing the complaint herein on the merits on the ground that it appears on the face of the complaint that the complaint does not [fol. 2] state facts sufficient to constitute a cause of action, and that the Court has not jurisdiction of the subject of the action, and that the plaintiff has not legal capacity to sue, together with the costs of this motion, and for such other and further relief as may be just.

Dated New York, April 28, 1928.

Yours, etc., Simpson, Thacher & Bartlett, Attorneys for Defendants.

Office & Post Office Address: 120 Broadway, New York, N. Y.

To Russell H. Robbins, Esq., Attorney for Plaintiff, 2 Rector Street, New York, N. Y.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUMMONS, WITH NOTICE

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable John C. Knox, Judge of the District Court of the United States for the Southern District [fol. 4] of New York, at the City of New York, this 9th day of February, A. D., 1928.

Alex Gilchrist, Jr., Clerk. (Seal.) Russell H. Robbins, Plaintiff's Attorney.

Office and Post Office address: 2 Rector St., Borough of Manhattan, City of New York.

To the defendants within named:

Take notice that upon your default judgment will be taken against you for the sum of $983,516.22 with interest from February 9, 1928, and the costs of this action.

Russell H. Robbins, Plaintiff's Attorney.

[fol. 5] IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT

The plaintiff, complaining of the defendants, Sidney Z. Mitchell and Neil A. Weathers, as Executors of the last will and testament of Richard Edwards Breed, deceased, upon information and belief for a first cause of action says:

I

That plaintiff is the duly elected, qualified and acting treasurer of the County of Grant in the State of Indiana, of which state he was at the time of the commencement of this suit and now is a bona fide citizen, resident and inhabitant; that by the laws of said state he is authorized and [fol. 6] empowered to institute and prosecute this suit, as hereinafter more particularly alleged:

That the defendants, Sidney Z. Mitchell and Neil A. Weathers, are the duly appointed, qualified and acting executors of the last will and testament of Richard Edwards Breed, deceased; that said defendant Sidney Z. Mitchell at the time of the commencement of this suit was and still is a bona fide citizen, resident and inhabitant of the State of New York, Southern District of New York; and that said defendant Neil A. Weathers at the time of the commencement of this suit was and still is a bona fide citizen, resident and inhabitant of the State of New Jersey.

II

That during each of the years from 1888 to 1926, both inclusive, said Richard Edwards Breed was a bona fide citizen, resident and inhabitant of the State of Indiana and during all of said time had and maintained his residence in said State in the Cit yof Marion, Grant County, Indiana; that during all of the years aforesaid he had and maintained a residence in no other place.

III

That said Richard Edwards Breed died testate on October 14, 1926; that administration was had on his estate in said State of New York, whereby the defendants, named by him in his last will and testament as his executors, have qualified in their said trust and are now engaged in administering said estate as the sole executors thereof; that said [fol. 7] administration is still pending in the Surrogate's Court of the County of New York, in the State of New York, and no distribution of said estate has yet been made.

IV

That during the lifetime of said Richard Edwards Breed and at the time of his death, he was the absolute owner in his own right of large amounts of intangible personal property consisting of bonds, notes, mortgages, accounts, credits, cash on hand and on deposit in bank, and particularly, consisting of large numbers of shares of common and preferred stocks in various business corporations organized and incorporated in states other than the State of Indiana, all of which property, during the respective years of his residence in the State of Indiana, was taxable to him as the owner thereof in Grant County, State of Indiana, under and by virtue of the statutes of the State of Indiana which at all times aforesaid required residents of said state to annually make a full, true and complete disclosure on oath of all bonds, notes, mortgages, accounts, credits, cash on hand and on deposit in bank, and all other personal property owned by them, and of all stocks owned by them in foreign corporations, on March 1 of each of said years of ownership and to state therein the true cash value thereof; and to return said information each year to the proper taxing officials in the township in said State wherein such owner then resided; that by means of said statutes the State of Indiana in each of the years from 1903 to 1926, both inclusive, fixed the taxable situs of foreign stocks, bonds, notes, mortgages, [fol. 8] accounts, credits, cash on hand and on deposit and all other intangible personal property owned by its residents, as the domcile of such residents in the township of their residence in said State of Indiana, so far as pertained to the taxation within said state of said stocks, bonds, notes, mortgages, accounts, credits, cash on hand and on deposit and all other intangible personal property; that at all said times said property was of great value.

That the said corporations, foreign to the State of Indiana, in which said Richard Edwards Breed owned shares of stock as aforesaid during all or part of the times aforesaid, were as follows:

American Gas & Electric Co., a New York Corporation,
American Power & Light Co., a Maine Corporation,
Carolina Power & Light Co., a North Carolina Corporation,
Electric Bond & Share Co., a New York Corporation,

The North American Co., a New Jersey Corporation,
General Electric Co., a New York Corporation,
Central States Electric Corporation, a Virginia Corporation,
Electric Investment Corporation, a Virginia Corporation,
Kansas Gas & Electric Co., a West Virginia Corporation,
Utah Securities Corporation, a Virginia Corporation,
Northwestern Ohio Light Co., an Ohio Corporation,
[fol. 9] Ohio Power Co., an Ohio Corporation,
Ohio Service Co., an Ohio Corporation,
Ohio State Power Co., an Ohio Corporation,
Rockford Electric Co., an Illinois Corporation,
Scranton Electric Co., a Pennsylvania Corporation,
Benton Harbor, St. Joe Railway & Light Co., a Michigan Corporation,
Cape May County Electric Co., a New Jersey Corporation,
Five Mile Beach Electric Railway Co., a New Jersey Corporation,
West Jersey Electric Co., a New Jersey Corporation,
West Virginia Water & Electric Co., a West Virginia Corporation,
Wheeling Bank & Trust Co., a West Virginia Corporation,
Wheeling Electric Co., a West Virginia Corporation,
Kentucky & West Va. Power Co., a Kentucky Corporation,
Asheville Power & Light Co., a North Carolina Corporation,
Yadkin River Power Co., a North Carolina Corporation,
Windsor Power House Coal Co., a West Virginia Corporation,
Fidelity Investment Association, a West Virginia Corporation,
Electric Power and Light Corporation, a Maine Corporation,
Atlantic City Electric Co., a New Jersey Corporation.

That a substantial part of said property so owned by said [fol. 10] Richard Edwards Breed has come into the hands and under the control of the defendants as his executors and the same is now held by them in the State of New York as part of the assets of his estate now in course of administration.

V

That it was the duty of said Richard Edwards Breed as a resident of said State of Indiana and by virtue of the laws

of said State, in each of the years of his residence therein as aforesaid, and on the regular tax assessment date in each of said years, to disclose and return, on oath, to the taxing authorities in said County of Grant and State of Indiana, and in Center Township thereof, in which he resided, all of the said personal property so owned by him on each of said assessment dates, for assessment and taxation for County, City, Civil and School Township taxes to be severally levied according to law by said taxing units respectively;

That in violation of his duty in the premises and of the laws of said State of Indiana, said Richard Edwards Breed made no disclosure or tax schedule and return, as to his ownership or interest in any of said taxable foreign stocks, bonds, notes, mortgages, accounts, credits, cash on hand and on deposit, and all other personal property, but wholly failed to disclose and list any of the same for assessment and taxation in the State of Indiana during any of the years aforesaid; and thereby concealed, sequestered and omitted from taxation in said State all of his said taxable property and unjustly and thereby, in contravention of the laws [fol. 11] of the State of Indiana, escaped assessment for taxation in said State on all of said taxable property.

That neither said Richard Edwards Breed, the present defendants nor any other person or persons has or have paid taxes on any of said property in the State of Indiana or elsewhere for any of the years aforesaid; but all of said property has wholly escaped taxation in said State and in all other States throughout said entire period of ownership of the same by said Richard Edwards Breed, and at all times thereafter.

VI

That at no time prior to the death of said Richard Edwards Breed was it known to the taxing officials of said Grant County or of any of its political subdivisions, including said City of Marion, nor had they nor any of them reason to suspect that said Richard Edwards Breed was, or at any time had been, the owner of any of the intangible personal property aforesaid;

That the statutes of Indiana in force at the times hereinafter mentioned provided that "Whenever the county auditor shall discover or receive credible information, or if he

shall have reason to believe, that any real or personal property has, from any cause, been omitted in whole or in part, in the assessment of any year or number of years, from the assessment book or from the tax duplicate, he shall proceed to correct the tax duplicate, and add such property thereto, with the proper valuation, and charge such property and the owner thereof with the proper amount of taxes thereon; to enable him to do which, he is invested with all [fol. 12] the powers of assessors under this act. But before making such correction or addition, if the person claiming to own such property, or occupying it or in possession thereof, resides in the county, and is not present, he shall give such person notice in writing of his intention to add such property to the tax duplicate, describing it in general terms, and requiring such person to appear before him, at his office, at a specified time within five days after giving such notice, and to show cause, if any, why such property should not be added to the tax duplicate; and if the party so notified does not appear, or if he appears and fails to show any good and sufficient cause why such assessment shall not be made, the same shall be made, and the county auditor shall, in all cases, file in his office a statement of the facts or evidence on which he made such correction. * * * When the county auditor shall discover, or receive credible information, or have reason to believe, that real or personal property has, from any cause, been omitted, in whole or in part, from assessment for taxation, or such credible information shall be furnished to such county auditor, it shall be the duty of such county auditor to take the steps provided for by this section to place such omitted property on the tax duplicate;" said statute being Section 14246 of Burns Annotated Indiana Statutes (1926).

That after the death of said Richard Edwards Breed the auditor of said Grant County received credible information and by reason thereof had cause to believe that large amounts of foreign stocks, bonds, notes, mortgages, accounts, credits, cash on hand and on deposit, and other personal property, hereinbefore referred to, and owned by [fol. 13] said Breed, had been wholly omitted in the assessment of each of the years from 1903 to 1926, both inclusive, from the tax assessment book and tax duplicate of said Grant County; that acting upon said information said

auditor on the 8th day of April, 1927, gave written notice to the present defendants as executors of the last will and testament of said Richard Edwards Breed, of his intention to conduct an official hearing and investigation under said statutes with respect to said ownership and the taxable value of said omitted personal property, and of his intention to add such property to the tax duplicate describing it in general terms, and by said notice required said executors to appear before him, at his office in the Court House in the city of Marion, Grant County, Indiana, on the 15th day of April, 1927, then and there to show cause, if any, why such property should not be added to the tax duplicate of said county; that at the time and place aforesaid, said auditor held such hearing pursuant to the notice above mentioned and on evidence then and there produced before him, found that the aforesaid property had theretofore been owned by said Richard Edwards Breed during each of the years 1903 to 1926, both inclusive, and had unjustly and unlawfully escaped taxation in Grant County, Indiana; and by his official finding upon said evidence, said auditor fixed and assessed the fair and proper taxable value of said omitted property at the following amounts for each of the years here indicated:

Year	Taxable value
1903	$310,000.00
1904	345,000.00
1905	383,000.00
[fol. 14] 1906	426,000.00
1907	473,000.00
1908	525,000.00
1909	584,000.00
1910	649,000.00
1911	721,000.00
1912	801,000.00
1913	890,000.00
1914	989,000.00
1915	1,098,000.00
1916	1,220,000.00
1917	1,356,000.00
1918	1,507,000.00
1919	1,674,000.00

Year	Taxable value
1920	1,860,000.00
1921	2,067,000.00
1922	2,296,000.00
1923	2,552,000.00
1924	2,835,000.00
1925	3,150,000.00
1926	3,500,000.00

That upon said taxable values said auditor assessed taxes for State, County, City, Civil Township, and School Township purposes, in the aggregate amount of $1,076,493.50; and upon said taxable values said auditor assessed the following proper amounts of taxes for each of the years indicated, for County, City, Civil Township, and School Township purposes in said Grant County, and its political subdivisions, and exclusive of all taxes due the State of Indiana; which county and each of its political subdivisions aforesaid at all times herein mentioned, were municipal [fol.15] corporations, with power to sue and be sued:

Year	Taxes
1903	$8,470.75
1904	8,668.12
1905	9,867.99
1906	10,890.69
1907	11,051.64
1908	13,001.62
1909	14,462.76
1910	18,246.63
1911	19,982.51
1912	22,920.61
1913	30,162.10
1914	36,286.41
1915	45,665.82
1916	50,861.80
1917	59,650.44
1918	73,074.43
1919	28,458.00
1920	48,732.00
1921	61,596.60
1922	60,155.20

Year	Taxes
1923	78,601.60
1924	79,663.50
1925	92,295.00
1926	99,750.00
	$982,516.22

VII

That the aforesaid taxes were computed by said auditor according to the respective tax rates, exclusive of rates of taxes due the State of Indiana, for each of the several years [fol. 16] aforesaid, which had been previously adopted and levied for each of said years, in conformity with all legal requirements, by the duly constituted taxing authorities of said Grant County, and of each of its several political subdivisions aforesaid, which authorities were charged by law with the levy of said taxes; and said rates so levied were duly and regularly certified by said respective taxing authorities to the auditor of said Grant County pursuant to law; which several tax rates, which were exclusive of all rates of taxes due the State of Indiana, were those applied and enforced by the taxing authorities of said Grant County and its political subdivisions during each of the years aforesaid in the general taxation, other than taxation for the benefit of the State of Indiana, of property belonging to residents of said county and of its several political subdivisions; and were the same rates which, exclusive of rates of taxes due the State of Indiana, would have been applied and enforced in each of said years as to the said omitted property of Richard Edwards Breed, if he had duly and at the proper times returned said property for taxation in said Grant County, Indiana.

VIII

That, pursuant to the statute aforesaid, said auditor thereupon proceeded to correct the tax duplicate of said Grant County and enter said omitted property for taxation by adding to said tax duplicate the omitted property aforesaid, with the foregoing proper valuation thereof, and charged such property and the defendants herein, as execu-

tors of the last will and testament of said Breed, with the above proper amounts of taxes for each of the years above [fol. 17] specified; and said auditor thereupon filed in his office a statement of the facts and evidence on which he made and entered such correction; and at the time of entering said omitted property on the tax duplicate, he deposited in the United States mail, properly addressed to the present defendants as executors aforesaid, written official notice of said assessment; and said auditor has, in all particulars, fully complied with the statutes of the State of Indiana in such cases made and provided;

That there was in force at all the times hereinafter mentioned a statute of the State of Indiana, reading as follows:

"That from any finding, conclusion or decision of any county assessor, any county auditor, any county treasurer or any other officer or officers or board whose duty it may be to investigate, decide, assess and place on the tax duplicate of any county of this state any property subject to taxation and omitted to be returned, listed and assessed for taxation, the owner of such property or other person against whom such omitted property has been assessed shall have the right to appeal from such finding, conclusion or decision to the circuit court of the county wherein said omitted property is so listed or added for taxation: Provided, That such appeal shall be taken within ten days after the entering of such omitted property on the tax duplicate of such county, by the taxpayer or person against whom such taxes are assessed filing his written undertaking with the auditor of such county with security to be ap- [fol. 18] proved by such auditor conditioned to pay, without delay, all taxes, interest, and penalties as may on final hearing be found due, together with costs assessed against him: Provided, also, The officer so entering such omitted property for taxation shall, at the time of entering the same on the tax duplicate, deposit in the United States mail properly addressed to the taxpayer against whom the assessment is made, notice of said assessment: Provided, further, That either party to such proceedings aggrieved by the judgment of such circuit court on such appeal shall have the right to appeal from such judgment to the supreme

court of Indiana, and such appeal shall be taken as other appeals are taken from judgments in civil actions from the circuit court to the supreme court."

That said defendants had reasonable and timely notice of said auditor's hearing and finding, but have prosecuted no appeal therefrom under the foregoing statutes of the State of Indiana providing for such appeals, nor have they taken any steps to question said valuation, assessment or correction of said tax duplicate; but the same are now in full force and effect as originally made by said auditor.

IX

That all of said taxes assessed and entered as aforesaid became due and payable, according to the laws of the State of Indiana, to this plaintiff as treasurer of Grant County, Indiana, on or before May 2, 1927; that none of the same [fol. 19] were then or thereafter paid; that by force of the laws of said State of Indiana all of said taxes immediately after May 2, 1927, became and are now delinquent, and collectible by this plaintiff as delinquent taxes, under and by virtue of the Statutes of the State of Indiana now in force and effect, which provide, with respect to the duties of county treasurer:

"It shall be the duty of the county treasurer to receive and collect all taxes shown upon the duplicate of such city for city purposes the same as he is required by law to receive and collect taxes shown thereon for state, county, township, road and other purposes"; (Burns Annotated Statutes of Indiana (1926) Section 14299);

"Said treasurer, in his name as such officer, may, or whenever requested so to do by the board of county commissioners, shall at any time after delinquency, institute and prosecute to final judgment and execution, all suits and proceedings necessary for the collection of delinquent taxes owing by any person residing outside of the State of Indiana, or by his legal representatives, whenever either said treasurer or said board, as the case may be, determines a reasonable probability exists that the said delinquent taxes, or a substantial part thereof, can be collected in this or any other state by such suit or proceedings"; (Indiana Session

Laws of 1927, Chapter 54, p. 141, Section 1), which determination, as to the existence of a reasonable probability of collection, was made by this plaintiff prior to the commencement of this suit; that in bringing suit to collect said taxes this plaintiff is proceeding under and pursuant to the statutes of the State of Indiana for the ultimate benefit of said Grant County, said city of Marion, and the civil and school [fol. 20] townships wherein said Richard Edwards Breed resided as aforesaid, which municipal corporations will respectively be entitled to the entire amount collected hereby, after deducting expenses as provided by law.

X

That by reason of the failure of said Richard Edwards Breed to return his said property for taxation or to pay taxes thereon in Indiana during each of the years of his said ownership, he became and at all times thereafter continued to be until his death justly indebted to said Grant County and to its political subdivisions, including said city of Marion, in the amount of such taxes as were justly and reasonably assessable against him on said property for each of said years, as hereinabove set forth; which indebtedness is now due and is wholly unpaid; that prior to the commencement of this suit, plaintiff made demand upon said defendants as executors aforesaid, for the payment of said indebtedness, with which demand said defendants have neglected and refused to comply.

XI

That neither said Richard Edwards Breed, nor the defendants as his executors, at any time attempted to avail themselves of the processes of law provided by the State of Indiana to test the taxability of said property to him as a resident of Indiana, or any other question of law or of fact pertaining to said property or to the ownership, valuation or taxability thereof.

[fol. 21] For a separate and distinct cause of action, plaintiff further alleges:

XII

That he realleges and reaffirms each allegation contained in the preceding numbered paragraphs I to XI, both in-

clusive, to the same effect as if the same were herein set out in full.

XIII

That by reason of the failure of said Richard Edwards Breed to return his said property for taxation or to pay taxes thereon in Indiana during each of the years of his said ownership, he became and at all times thereafter continued to be until his death justly indebted to said Grant County and to its political subdivisions, including said city of Marion, in the amount of such taxes as were justly and reasonably assessable against him on said property for each of said years, as hereinabove set forth; which indebtedness is now due and is wholly unpaid; that prior to the commencement of this suit, plaintiff made demand upon said defendants as executors aforesaid, for the payment of said indebtedness, with which demand said defendants have neglected ahd refused to comply.

XIV

That neither said Richard Edwards Breed, nor the defendants as his executors, at any time attempted to avail themselves of the processes of law provided by the State of Indiana to test the taxability of said property to him as a resident of Indiana, or any other question of law or of fact pertaining to said property or to the ownership, valuation or taxability thereof.

[fol. 22]

XV

That by omitting to return his said property for taxation or to pay taxes thereon in Indiana as aforesaid, said Richard Edwards Breed unjustly, unlawfully and unconscionably withheld from Grant County and its political subdivisions, including said city of Marion, and retained for his own use and benefit a large sum of money each year in which said omission occurred, to the aggregate of $982,516.22, exclusive of all interest and penalties, by which amount, so withheld, representing taxes payable in Indiana on said property as aforesaid, said decedent in his lifetime and his estate at the time of his death were unjustly and unconscionably enriched; which sum said defendants, as said decedent's executors, unjustly and un-

conscionably still retain and thereby deprive said County of Grant and its political subdivisions aforesaid, including said city of Marion, of said moneys reasonably and conscionably due each of them.

Wherefore plaintiff demands judgment against the defendant for the sum of $982,516.22, with interest, and further demands that said sum be adjudged and established as a valid and enforceable claim against the defendants as executors of the last will and testament of Richard Edwards Breed, deceased, to be paid by them out of the assets of said estate in their hands as such executors; and plaintiff prays for costs of this action and all other necessary or proper relief in the premises.

Russell H. Robbins, Attorney for Plaintiff.

Office and P. O. Address: Two Rector Street, Borough of Manhattan, City of New York.

(Verified March 16th, 1928.)

[fol. 23] In United States District Court

Harry C. Moore, as Treasurer of Grant County, Indiana, Plaintiff,

against

Sidney Z. Mitchell and Niel A. Weathers (Sued as Neil A. Weathers), as Executors of the Last Will and Testament of Richard Edwards Breed, Deceased, Defendants

Order Granting Motion to Dismiss—June 22, 1928

This cause having duly come on to be heard on the 18th day of May, 1928, upon the motion on the part of the defendants for an order dismissing the complaint on the merits with costs on the ground that it appears on the face of the complaint that the complaint does not state facts sufficient to constitute a cause of action, that the Court has [fol. 24] not jurisdiction of the subject of the action and that the plaintiff has not legal capacity to sue.

Now, on reading and filing the summons and complaint, stipulation extending the time of defendants to answer or

move with respect to the complaint to and including May 4th, 1928, the notice of motion dated April 28, 1928, with proof of due service thereof and the stipulation adjourning the hearing of said motion to May 18, 1928, and upon hearing Messrs. Simpson, Thacher & Bartlett, attorneys for the defendants, by Louis Connick, Esq., of counsel, in support of said motion and Russell H. Robbins, Esq., attorney for the plaintiff in opposition thereto and upon the briefs submitted by the attorneys for the respective parties and upon filing the opinion of the Court, it is,

Ordered that the motion on behalf of the defendants to dismiss the complaint be, and the same hereby is granted on the ground that the complaint does not state a cause of action of which this Court will take jurisdiction.

Jno. C. Knox, U. S. D. J.

[fol. 25] In United States District Court

[Title omitted]

Russell H. Robbins, Esq., attorney for plaintiff.

Simpson, Thacher & Bartlett, Esqs., attorneys for defendants (Louis Connick and W. N. Seymour, Esqs., of counsel).

Opinion

Knox, D. J.:

This suit is brought by plaintiff in his capacity as Treasurer of Grant County, Indiana, against the executors of Richard Edwards Breed, deceased, to recover certain taxes which it is said arose, and were incurred by the decedent during his lifetime, and while he was a resident of that State. The executors are residents of New York, and were appointed by authority of the Surrogate's Court of New York County. The property in their possession consists of certain securities which were owned by Breed, but which [fol. 26] were never physically within the State of Indiana. Under the law of New York, as declared by its Court of Appeals, a claim of the character here made against defendants will not be enforced by the local courts. State of Colorado vs. Harbeck, 232 N. Y. 71. Were this Court to

give judgment against the executors, they might find themselves in a highly embarrassing situation, if, after paying a judgment in favor of plaintiff, the court which appointed them should refuse to credit such payment upon the settlement of their accounts.

This possibility, in the absence of certainty that the plaintiff is entitled to maintain the present suit would counsel hesitation before subjecting the executors to the peril to which reference has been made. In such event, I should be inclined to dismiss the complaint, and thus allow the propriety of the suit to be pronounced by an appellate court before permitting a judgment to go against the defendants.

There is, however, another consideration which strengthens my belief that the complaint should be dismissed. It is that plaintiff has not called attention to a single authoritative decision which, under circumstances such as are revealed by the present pleading, permitted the tax collecting officer of a polici*t*al subdivision of one State, or the revenue authorities of such State, to go within the borders of another, and there collect taxes from property that never was within the jurisdiction where the assessment was made, or from persons who were non-residents of the sovereignty which authorized such assessment. The inability of the plaintiff to point to some substantial authority in support [fol. 27] of the proposition which he urged at the bar, and in his brief is due, I think, to the fact, as declared by the State Court of Appeals in the Harbeck case, that private international law "precludes one State from acting as a collector of taxes for a sister State and from enforcing its penal or revenue laws as such," it being "universally recognized that the revenue laws of one State have no force in another." See Wisconsin vs. Pelican Insurance Co., 127 U. S. 265, and New York Trust Co. v. Island Oil & Transport Corp., 11 Fed. (2d) 698.

As a result of what has been said, I do not conceive it to be the duty of this Court, notwithstanding the weight of insistence to the contrary, to undertake the enforcement within the State of New York, of the revenue laws of Indiana. The course of procedure to be followed by a Federal Court, when asked to apply the law of a foreign State in a manner that is not permitted by the law of the State within

which the Court functions, is outlined in Pennoyer v. Neff, 95 U. S. 714, and Packer v. Moore, 115 Fed. 799.

Defendants' motion to dismiss the complaint will be granted.

June 12, 1928.

John C. Knox, U. S. D. J.

[fol. 28] In United States District Court

[Title omitted]

Petition for Appeal

To the Honorable the Judges of the United States District Court for the Southern District of New York:

Your petitioner, Harry C. Moore, as Treasurer of Grant County, Indiana, conceiving himself aggrieved by the certain order entered on the 22nd day of June, 1928, in the above entitled action dismissing the complaint upon the ground that the complaint does not state a cause of action of which this court will take jurisdiction, does hereby petition for an appeal from said order to the United States Circuit Court of Appeals for the Second Circuit, and prays [fol. 29] that his appeal may be allowed and that a citation may be granted, directed to Sidney Z. Mitchell and Niel A. Weathers, as Executors of the Last Will and Testament of Richard Edwards Breed, deceased, to appear before the United States Circuit Court of Appeals for the Second Circuit, to do and receive that which may appertain to justice to be done in the premises and evidence of said proceedings, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

Harry C. Moore, as Treasurer of Grant County, Indiana, Plaintiff. Russell H. Robbins, Attorney for Plaintiff.

[fol. 30] In United States District Court

Allowance of Appeal

Appeal allowed August 23, 1928.

Frank J. Coleman, D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes Harry C. Moore, as Treasurer of Grant County, Indiana, the plaintiff herein, and files the following assignment of errors on appeal from the order entered herein on the 22nd day of June, 1928, granting the defendants' motion to dismiss the complaint upon the ground that [fol. 31] the complaint does not state a cause of action of which this court will take jurisdiction:

First. That the court erred in that it failed and refused to take jurisdiction of this action.

Second. That the court erred in holding that the cause of action stated in the complaint was one of which this court would not take jurisdiction.

Third. That the court erred in granting the defendants' motion to dismiss the complaint upon the ground that the complaint did not state a cause of action of which this court will take jurisdiction.

Russell H. Robbins, Attorney for Plaintiff.

Office & P. O. address: 2 Rector Street, Borough of Manhattan, City of New York.

[fol. 32] Citation, in usual form, omitted in printing.

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said district court in the above entitled action as agreed upon by the parties.

Dated September 8, 1928.

Russell H. Robbins, Attorney for Appellant. Simpson, Thacher & Bartlett, Attorneys for Appellees.

[fol. 34] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 35] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

HARRY C. MOORE, as Treasurer of Grant County, Indiana, Plaintiff-Appellant,

against

SIDNEY Z. MITCHELL and NIEL A. WEATHERS (Sued as Neil A. Weathers) as Executors of the Last Will and Testament of Richard Edwards Breed, Deceased, Defendants-Appellees

Before Manton, Learned Hand and Augustus N. Hand, Circuit Judges

Appeal from the District Court for the Southern District of New York. Action by plaintiff against the defendants to recover for taxes assessed and not paid. Judgment for the defendants dismissing the complaint; plaintiff appeals. Affirmed.

Russell H. Robbins, Esq., Attorney for Appellant. Russell H. Robbins, Esq., Henry M. Dowling, Esq., of Counsel.

Simpson, Thacher & Bartlett, Esqs., Attorneys for Appellees. Louis Connick, Esq., W. N. Seymour, Esq., of Counsel.

OPINION

MANTON, Circuit Judge:

This action is by the County Treasurer of Grant County, Indiana, to recover taxes alleged to be due and unpaid. [fol. 36] The complaint was dismissed on motion because it did not state a cause of action of which the court would take jurisdiction. The appellees are executors of the last will and testament of Richard Edwards Breed who is alleged to have resided in Grant County, Indiana during the years 1903 to 1926 and did not pay a tax as required by the Indiana Session Laws of 1903 (§ 14288, Burns Rev. Indiana Stat. for 1926). The statute provides that

"All the property, both real and personal, situated in any county, shall be liable for the payment of all taxes, penalties, interest and costs charged to the owner thereof in such county, and no partial payment of such taxes, penalties, interest or costs shall discharge or release any part or portion of such property until the whole is paid; which lien shall in nowise be affected or destroyed by any sale or transfer of any such personal property, and shall attach on the first day of March, annually, for the taxes of such year."

The assessment was made after Breed's death by the Grant County taxing assessors. Authorization to commence the suit is found in the Session Laws of 1927, Chap. 54, p. 141, § 1, which was passed after the death of Breed. It authorizes the treasurer, in his name, as such officer, to institute and prosecute to final judgment and execution, all suits and proceedings necessary for the collection of delinquent taxes owed by any person residing outside the State of Indiana and provides that for his services in so doing, the treasurer shall charge and receive 25 per centum of the moneys so collected.

There is no allegation in the bill that any of the deceased's property referred to therein was ever physically within the State of Indiana or that the deceased died there. The first cause of action is based upon an alleged indebtedness of the deceased due for the taxes alleged to have been assessed against the deceased after his death, and the second, on an [fol. 37] alleged unjust enrichment of the deceased and the appellees as executors, because of failure to pay the taxes. No lien is claimed to have been imposed upon any property of the deceased by reason of the proceedings for the assessment of taxes. Thus, only a personal liability is asserted, for taxes which were not liquidated until after the death of the deceased.

Taxes are imposts, not debts, collected for the support of the government. Meriwether v. Garrett, 102 U. S. 472. The form of procedure to collect them cannot change their character. Any contractual or quasi contractual obligation to pay arises out of the assessment. The enforcement of revenue laws rests not on consent, but on force and authority. State of Colorado v. Harbeck, 232 N. Y. 71. An action for debt cannot be maintained to collect a tax in the New York

State courts. City of New York v. McLean, 170 N. Y. 374; Matter of Maltbie v. Lobsitz Mills Co., 223 N. Y. 227. See also, City of Boston v. Turner, 201 Mass. 190. With the appellees and the property without the state, and the estate being administered in New York, the effort to collect a tax, for a political sub-division of Indiana, is repugnant to the settled principles of private international law which preclude one state from acting as a collector of taxes for a sister state and from enforcing its penal or revenue laws as such. The revenue laws of one state have no force in another. The taxing power of a state is, by the Federal Constitution, limited to persons and property within its jurisdiction. Wisconsin v. Pelican Ins. Co., 127 U. S. 265. This court in New York Trust Co. v. Island Oil & Transport Corp. 11 Fed. (2) 698, considered a request for instructions as to whether equity receivers should pay the franchise [fol. 38] taxes of a corporation in receivership where the corporation was organized in the State of Virginia, and there we said that "if the receivers in the exercise of their business discretion deem it expedient to pay this tax, they are authorized to do so; but they are not required to do it, because the State of Virginia has no legal right to demand payment for them." A further question was there presented as to the lawful right to collect taxes out of the estate not within the taxing jurisdiction and from representatives of the taxpayers not within the taxing jurisdiction, and we concluded that there was no legal liability to pay. In State of Colorado v. Harbeck, supra, it was held that the State Court could not be used to collect taxes due a sister state. The action was brought to recover an inheritance tax upon the estate of Harbeck, a resident of Colorado. He died in New York. The will and codicils were probated in New York, transfer tax proceedings were had in New York and the taxes were assessed as upon the estate of a non-resident and paid. No provision was made in the accounts finally settled for the payment of transfer tax to the state of Colorado which had notice of the proceedings in New York. The estate which was assessed for taxation consisted of stocks and bonds, none of which were physically present in Colorado at the time of the decedent's death or thereafter. The complaint was dismissed. The tax laws of one state cannot be given extra territorial effect so as to make collections

through the agency of the courts of another state. Indiana's political sub-division, Grant County, is limited in the payment of taxes to property found within its boundaries. [fol. 39] State of Iowa vs. Slimmer, 248 U. S. 115; Ashley vs. Ryan, 153 U. S. 436; Matter of Anita Bliss, 121 Misc. (N. Y.) 773; Walker vs. Treasurer, 221 Mass. 600; People vs. Kellogg, 268 Ill. 489. In Wisconsin vs. Pelican Ins. Co., 127 U. S. 265 the state of Wisconsin commenced an action of debt in the Supreme Court of the United States against a corporation of Louisiana in which it sought to collect upon a judgment recovered in a Wisconsin court for penalties imposed by the statutes of Wisconsin for not making returns to the insurance commissioner of that state as required by law. Granting judgment for the defendant upon demurrer, the Supreme Court pointed out that "The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue * * *."

The appellant's argument that the extra territorial imposition of tax is to be distinguished from the extra-territorial collection or enforcement of the tax, is without merit. The appellant attempted to impose a tax prior to the commencement of the action. The taxing authorities went through the forms prescribed by the statutes of Indiana, but Breed was dead before the assessment and the attempt was fruitless. The property was not physically there. Under the due process clause of the United States Constitution, Indiana had no jurisdiction to impose a tax because neither the property or the deceased was within its jurisdiction at the time the tax was assessed. It may not now use the na- [fol. 40] tional district court outside of the state to collect such tax. But it is said that Blodgett vs. Silverman, 277 U. S. 1, overrules what is said in the Harbeck case. The Blodgett case did not deal with the question of extra-territorial enforcement of state tax statutes which is presented in this case. That case involved the question of whether the State of Connecticut could tax the transfer of certain intangible personal property under a will probated in Connecticut and collect the tax in a Connecticut court against executors appointed by the Connecticut Court of Probate.

The deceased was domiciled in Connecticut at the time of his death. The court decided that intangible personality has such a situs as the domicile of its owner and its transfer on his death may be taxed there. No question of jurisdiction of the State of Connecticut over the executors was presented. The decision in the Blodgett case was limited to upholding a transfer tax upon intangibles in a court which had jurisdiction to tax. That principle is recognized in the cases we have referred to.

Assuming Breed was domiciled in Indiana, as alleged in the complaint, the taxes were not assessed until after his death and until after the appellees were administering his estate in the jurisdiction of the New York Surrogate's Court. The amount of the tax had not been ascertained and no attempt was made to impose the taxes prior to death. The Indiana statute imposes a duty upon the resident to report taxable property. It creates no liability before the amount of taxes claimed is determined. It was necessary for the taxing authorities to assess the taxes and determine the amount claimed to be due. It is not a transfer tax or a [fols. 41 & 42] succession tax claimed, but a personal property tax. The application of the fiction of mobilia sequuntur personam would require an assessment during each of the years for which taxes are claimed, during the lifetime of the decedent, to reach the conclusion that there was a personal liability to pay these taxes during his life. Jurisdiction is not to be founded upon a multiplication of fictions and in no true sense can it be said that Indiana had jurisdiction to impose the taxes for which this suit is brought. Certainly, the court below had not jurisdiction of the cause of action alleged and the complaint was properly dismissed.

Judgment affirmed.

[fol. 43] In United States Circuit Court of Appeals

[Title omitted]

Concurring Opinion

L. Hand, Circuit Judge (concurring):

Although the Supreme Court of Indiana has not passed upon the question, I think that a personal liability was im-

posed upon Breed before his death, which was after March first. That is the date when the tax is imposed and when the lien attaches to any property within the State. It can hardly be that the lien arises before the liability, and the assessment may be, and in my judgment should be, considered as no more than a liquidation of a liability already existing. Nor does the actual location of the property taxed affect the validity of this tax, which was personal. As to shares in corporations, there has, I think, never been any doubt, and negotiable bonds are now to be considered in the same class, Blodgett v. Silberman, 277 U. S. 1. Had any of the property consisted of chattels, coin or bank notes, situated outside Indiana, another question would have arisen, but this was not the case. Hence it seems to me that the liability was valid; it is not even argued that if so it did not survive.

We must therefore decide whether a tax lawfully imposed in a foreign State can be collected by suit in a Fed- [fol. 44] eral court sitting in another State. Our jurisdiction is in this respect no different from that of a court of the State of New York; the law to be administered is certainly not the law of Indiana, whether it be the law of New York, or whether in such cases there is a common-law independent of the laws of any State. Generally it is of course true that a liability arising under the law of a foreign State will be recognized by the courts of another, and it is not here relevant whether foreign liability is enforced, or another, precisely similar, raised by the law of the forum.

A recognized exception is in the case of criminal and penal liabilities, (The Antelope, 10 Wheat. 66, 123; Wisconsin v. Pelican Ins. Co., 127 U. S. 265; Huntington v. Attrill, 146 U. S. 657; Huntington v. Attrill (1893) A. C. 150; Arkansas v. Bowen, 3 App. Dist. Col. 537; Dicey, Conflict of Laws, Rule 54). In some few cases this exception has been extended to include revenue laws as well, (Colorado v. Harbeck, 232 N. Y. 71; Municipal Council of Sydney v. Bull, (1909) 1 K. B. 7; Gulledge Co. v. Wenatchee Co., 122 Minn. 266; Canada v. Schulze, 9 Scotch L. T. 4), but so far as I can find the point has never been passed on by a Federal court.

While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists in my judgment which includes liabilities for taxes as

well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in foreign States if they run counter to the "settled public policy" of its own [fols. 45 & 46] State. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic State. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign State and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another State is, or at any rate, should be, beyond the powers of a court; it involves the relations between the States themselves with which courts have no power to deal and which are entrusted to other authorities. It may commit the domestic State to a position which would be of serious moment to the foreign State. Revenue laws fall within the same reasoning; they affect a State in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper. For these reasons I concur.

[fol. 47] In United States Circuit Court of Appeals

Second Circuit

Harry C. Moore, as Treasurer, etc., Plaintiff-Appellant,

v.

Sidney Z. Mitchell et al., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

Decree—Filed Feb. 11, 1929

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, ad-

judged, and decreed that the judgment of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

M. T. M., L. H.

[File endorsement omitted]

[fol. 48] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 49] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 3, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,188. United States Circuit Court of Appeals, Second Circuit. Term No. 79. Harry C. Moore, as Treasurer of Grant County, Indiana, petitioner, vs. Sidney Z. Mitchell and Niel A. Weathers (sued as Neil A. Weathers), as executors of the last will and testament of Richard Edwards Breed, deceased. Petition for writ of certiorari and exhibit thereto. Filed May 4th, 1929. File No. 34,188.